

Title of Regulation: **22 VAC 40-80. General Procedures and Information for Licensure (amending 22 VAC 40-80-60, 22 VAC 40-80-120, 22 VAC 40-80-340, 22 VAC 40-80-370, 22 VAC 40-80-430; adding 22 VAC 40-80-345).**

Statutory Authority: §§ 63.2-217, 63.2-1732, 63.2-1733 and 63.2-1734 of the Code of Virginia.

Summary:

The proposed amendments add a requirement regarding notification to the department when a licensee plans to close or sell a facility; add additional items to the list of documents that must be posted in a facility; add additional administrative sanctions that the commissioner may impose upon licensed facilities when they fail to maintain compliance with regulations or laws; and add a new section that provides procedures for summary orders of suspension. Also included are minor changes to procedures for consent agreements, for clarification and to remove unnecessary detail.

22 VAC 40-80-60. General.

A. A license to operate a facility or agency is issued to a specific person or organization to provide out-of-home care to children or adults. An organization may be a partnership, association, corporation, limited liability company, or public entity.

B. Pursuant to § 63.2-1712 of the Code of Virginia, any person, officer, or member of a governing board of any association or corporation that operates an assisted living facility, adult day care center, or child welfare agency shall be guilty of a Class 1 misdemeanor if he:

1. Interferes with any representative of the commissioner in the discharge of his licensing duties;
2. Makes to the commissioner or any representative of the commissioner any report or statement with respect to the operation of any assisted living facility, adult day care center, or child welfare agency that is known by such person to be false or untrue;
3. Operates or engages in the conduct of these facilities without first obtaining a license as required or after such license has been revoked or has expired and not been renewed; or
4. Operates or engages in the conduct of one of these facilities serving more persons than the maximum stipulated in the license.

C. *When a licensee plans to close or sell a facility, the licensee shall notify the appropriate licensing office at least 60 days prior to the anticipated closure or sale date. When the facility closes or the sale is finalized, the license shall be returned to the appropriate licensing office.*

22 VAC 40-80-120. Terms of the license.

A. A facility or agency shall operate within the terms of its license, which are:

1. The operating name of the facility or agency;
2. The name of the individual, partnership, association, corporation, limited liability company, or public entity sponsoring the facility or agency;
3. The physical location of the facility or agency;
4. The maximum number of children or adults who may be in care at any time;
5. The period of time for which the license is effective;
6. For child care facilities or agencies, the age range of children for whom care may be provided; and
7. Any other limitations that the department may prescribe within the context of the regulations for any facility or agency.

B. The provisional license cites the standards with which the licensee is not in compliance.

C. The conditional license cites the standards with which the licensee must demonstrate compliance when operation begins, and also any standards with which the licensee is not in compliance.

D. Prior to changes in operation that would affect the terms of the license, the licensee shall secure a modification to the terms of the license from the department. (See 22 VAC 40-80-190.)

~~E. The following documents shall be posted, when applicable, in a conspicuous place on the licensed premises so that they are visible to the public:~~ *Certain documents related to the terms of the license are required to be posted on the premises of each facility. These are:*

1. The most recently issued license. *Any provisional license shall be posted at each public entrance of the facility and a notice shall be prominently displayed next to the license that states that a description of specific violations of licensing standards to be corrected and the deadline for completion of such corrections is available for inspection at the facility or on the facility's website, if applicable;*

2. ~~The most recent violation notice findings of the most recent inspection of the facility;~~

~~3. Probationary status announcements;~~

~~4. Denial and revocation notices; and~~ 3. *Notice of the commissioner's intent to revoke or deny renewal of the license of an assisted living facility. Such notice will be provided by the department and shall be posted in a prominent place at each public entrance of the facility to advise consumers of serious or persistent violations.*

4. *A copy of any final order of summary suspension of all or part of an assisted living facility's license shall be prominently displayed by the provider at each public entrance of the facility, or the provider may display a written statement summarizing the terms of the order, printed in clear and legible size and typeface, in a prominent location and identifying the location within the facility where the final order of summary suspension may be reviewed.*

5. *Notice of the commissioner's intent to take any of the actions enumerated in subdivisions B 1 through B 6 of § 63.2-1709.2 of the Code of Virginia. Such notice will be provided by the department and a copy of the notice shall be posted in a prominent place at each public entrance of the facility to advise consumers of serious or persistent violations.*

6. *A copy of any special order issued by the department shall be posted in a prominent place at each public entrance of the licensed premises to advise consumers of serious or persistent violations.*

~~5-~~ 7. Any other documents required by the commissioner.

22 VAC 40-80-340. Administrative sanctions.

The commissioner may impose administrative sanctions or initiate court proceedings, severally or jointly, when appropriate in order to ensure prompt correction of violations involving noncompliance with state law or regulation in assisted living facilities, adult day care centers and child welfare agencies as discovered through any inspection or investigation conducted by the Department of Social Services, the Virginia Department of Health, the Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services, or by state and local building or fire prevention officials. These administrative sanctions include:

1. Petitioning the court to appoint a receiver for any assisted living facility or adult day care center;

2. Revoking or denying renewal of a license for any assisted living facility or adult day care center that fails to comply with the limitations and standards set forth in its license for violation that adversely affects, or is an imminent and substantial threat to, the health, safety or welfare of residents, or for permitting, aiding or abetting the commission of any illegal act in an adult care facility;

3. Revoking or denying renewal of a license for any child welfare agency that fails to comply with the limitations and standards set forth in its license;

4. *Requiring an assisted living facility to contract with an individual licensed by the Board of Long-Term Care Administrators to administer, manage or operate the facility on an interim basis if the commissioner receives information from any source indicating imminent and substantial risk of harm to residents. This action shall be an attempt to bring the facility into compliance with all relevant requirements of law, regulation or any plan of correction approved by the commissioner. The contract shall be negotiated in accordance with the provisions of § 63.2-1709 of the Code of Virginia;*

5. *Issuing a summary order of suspension of the license to operate an assisted living facility pursuant to proceedings set forth in § 63.2-1709 C of the Code of Virginia in conjunction with any proceedings for revocation, denial, or other action when conditions or practices exist that pose an imminent and substantial threat to the health, safety and welfare of residents; and*

~~4-~~ 6. Imposing administrative sanctions through the issuance of a special order as provided in § 63.2-1709 D of the Code of Virginia. These include:

a. Placing a licensee on probation upon finding that the licensee is substantially out of compliance with the terms of the license and that the health and safety of residents, participants or children are at risk;

b. Reducing the licensed capacity or prohibiting new admissions when the commissioner has determined that the licensee cannot make necessary corrections to achieve compliance with the regulations except by a temporary restriction of its scope of service;

~~c. Requiring that probationary status announcements, provisional licenses and denial and revocation notices be posted in a conspicuous place on the licensed premises and be of sufficient size and distinction to advise consumers of serious or persistent violation;~~

~~d. c.~~ Mandating training for the licensee or licensee's employees, with any costs to be borne by the licensee, when the commissioner has determined that the lack of such training has led directly to violations of regulations;

~~e. d.~~ Assessing civil penalties of not more than \$500 per inspection upon finding that the licensee of an adult day care center or child welfare agency is substantially out of compliance with the terms of its license and the health and safety of residents, participants or children are at risk;

e. Assessing a civil penalty for each day an assisted living facility is or was out of compliance with the terms of its license and the health, safety, and welfare of residents are at risk. The aggregate amount of such civil penalties shall not exceed \$10,000 in any 24-month period. Criteria for imposition of civil penalties and amounts, expressed in ranges, are developed by the board and are based upon the severity, pervasiveness, duration and degree of risk to the health, safety, or welfare of residents. Such civil penalties shall be applied by the commissioner in a consistent manner;

f. Requiring licensees to contact parents, guardians or other responsible persons in writing regarding health and safety violations; and

g. Preventing licensees who are substantially out of compliance with the licensure terms or in violation of the regulations from receiving public funds.

22 VAC 40-80-345. Summary suspension procedures.

A. In conjunction with any proceeding for revocation, denial, or other action when conditions or practices exist that pose an imminent and substantial threat to the health, safety and welfare of the residents, the commissioner may issue a summary suspension of the license to operate an assisted living facility or of certain authority of the licensee to provide certain services or perform certain functions.

B. Upon determining that summary suspension is appropriate, the hearing coordinator will select a hearing officer from a list prepared by the Executive Secretary of the Supreme Court of Virginia and will schedule the time, date, and location of the hearing to determine whether the suspension is appropriate as required by § 63.2-1709 C of the Code of Virginia.

C. Simultaneously with the issuance of a notice of revocation, denial or other action, the commissioner will issue to the licensee a notice of summary order of suspension setting forth the following:

- 1. The procedures for the summary order of suspension;*
- 2. The hearing and appeal rights as set forth below;*
- 3. Facts and evidence that formed the basis for which the summary order of suspension is sought; and*
- 4. The time, date, and location of the hearing.*

D. Notice of the summary order of suspension will be served on the licensee or his designee by personal service or by certified mail, return receipt requested, to the address of record of the licensee as soon as practicable after issuance thereof.

E. The hearing shall take place in the locality where the assisted living facility operates unless the licensee or his designee expressly waives this venue provision.

- 1. The hearing shall be held no later than 15 business days after service of notice on the licensee. The hearing officer may grant a continuance upon written request and for good cause shown. In no event shall any continuance exceed 10 business days after the initial hearing date.*
- 2. The hearing coordinator will forward a copy of the relevant licensing standards to the hearing officer.*
- 3. The hearing will be conducted in accordance with the procedures set forth in 22 VAC 40-80-480 through 22 VAC 40-80-500.*
- 4. The department may be represented either by counsel or by agency staff authorized by § 2.2-509 of the Code of Virginia.*

F. Within 10 days of the conclusion of the hearing, the hearing officer shall provide to the commissioner written findings and conclusions, together with a recommendation as to whether the license should be summarily suspended. The department shall have the burden of proof in any summary suspension hearing. The decision of the hearing officer shall be based on the preponderance of the evidence presented by the record and relevant to the basic law under which the agency is operating.

G. Within 10 days of receipt of the hearing officer's report and recommendation, the commissioner shall either (i) adopt the hearing officer's recommendation or (ii) reject the hearing officer's recommendation if it would be an error of law or department policy to accept it.

H. The commissioner shall issue and shall serve on the licensee or his designee by personal service or by certified mail, return receipt requested either:

1. A final order of summary suspension including (i) a detailed statement of the basis for rejecting the hearing officer's recommendation, if applicable, and (ii) notice that the licensee may appeal the commissioner's decision to the appropriate circuit court no later than 10 days following service of the order; or

2. A final order that summary suspension is not warranted by the facts and circumstances presented.

I. A copy of any final order of suspension shall be prominently displayed at each public entrance of the facility as required in 22 VAC 40-80-120.

J. The signed, original case decision shall remain in the custody of the agency as a public record, subject to the agency's records retention policy.

22 VAC 40-80-370. Appeal process.

A. The applicant or licensee will receive a notice of the department's intent to impose an administrative sanction. This notice will describe the sanction or sanctions and the reasons for the imposition. Service of the notice of adverse action is achieved by *certified* mailing of the notice to the applicant or licensee, unless service is made by other means and acknowledged by the applicant or licensee. If the applicant or licensee wishes to appeal the notice of adverse action, he shall have 15 days after ~~service receipt~~ of the notice to note his appeal. ~~If service is accomplished by mail, three days shall be added to the 15-day period.~~

B. Upon receipt of the notice to impose an administrative sanction, the applicant or licensee has the right to appeal the decision in accordance with the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). The procedures for filing an appeal will be outlined in the notice. The applicant or licensee shall submit any appeal of imposition of an administrative sanction in writing within 15 days of receipt of the notice.

C. If the applicant or licensee fails to appeal the notice of adverse action within 15 days of receipt of the notice, ~~the notice will constitute the department's final decision~~ *final order will be entered*. The decision will take effect 30 days after receipt of the notice.

D. The appeal process available is governed by law. Where the sanction is imposed by means of a special order as provided in § 63.2-1709 of the Code of Virginia, the case decision is issued by the commissioner following findings and conclusions resulting from the informal conference. Other sanctions include a provision for an administrative hearing, which is described in § 2.2-4020 of the Code of Virginia, prior to the issuance of the case decision. For ease of reference, the process steps are displayed in the following chart:

List of Sanctions with Appeal Provisions

	Informal Conference	Administrative Hearing	Circuit Court Review of Case Decision
ADMINISTRATIVE SANCTION			
Place licensee on probation	X		X
Reduce licensed capacity	X		X
Restrict admissions	X		X
Mandate training for licensee or staff	X		X
Assess civil penalty	X		X
Require written contact	X		X

with responsible persons			
Prevent receipt of public funds	X		X
Deny application for new or renewal license	X	X	X
Revoke license	X	X	X
File petition for appointment of a receiver			X
Require assisted living facility to contract with administrator	X	X	X

22 VAC 40-80-430. Consent agreements.

A. A consent agreement may be proposed by a licensee in lieu of adverse action. The proposed consent agreement shall be submitted no later than five work days prior to the conference unless different arrangements are agreed upon with the chair. In no case may a proposed consent agreement be submitted later than the day of the informal conference. ~~The duration and terms of the consent agreement are negotiable. A licensing representative will negotiate the proposed agreement with the licensee and submit the proposed agreement to the division director, who will make the decision to accept or reject the consent agreement on behalf of the department or recommend such acceptance or rejection to the commissioner.~~

B. An acceptable consent agreement shall contain the following specific elements:

1. Dates of key actions, such as letter of sanction, timely appeal, the informal conference (if already held), and the names of the parties;
2. The assertion that all violations detailed in the letter of denial or revocation have been corrected or will be corrected by a time specified in the proposed agreement;
3. A description in detail of the case-specific systemic solution proposed that addresses the causes of the past history of violations, including the methods the licensee has in place to prevent violations and to monitor results;
- ~~4. A statement agreeing to future maintenance of substantial compliance with all regulations;~~
- ~~5. Statements outlining and acknowledging the process and timelines for moving the proposed agreement through the steps that will follow submission of the proposal signed by the provider, including statements that (i) the Director of the Division of Licensing Programs will evaluate the proposal and respond by letter and (ii) the licensee understands that if the proposal is conditionally accepted, final approval and the division director's signature will be withheld until after satisfactory on-site verification of results, including the information that the duration of the agreement will begin when the director accepts and signs the document;~~
- ~~4. A stipulation by the licensee to the validity of the violations enumerated in the specified correspondence and waiver of right to hearing under the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia) solely with respect to those violations.~~
- ~~6.~~ 5. The duration of the consent agreement, including the information that the period begins when the division director signs;
- ~~7.~~ 6. A statement that when the division director signs the agreement, signifying final acceptance, the division director is also agreeing to rescind the outstanding adverse action and that the licensee is agreeing to withdraw all appeals to that action; and
- ~~8.~~ 7. A statement outlining conditions for termination of the final agreement for cause and the nature of the licensee's appeal rights in that event.

C. ~~Recommendation and approval process.~~

- ~~1. The department appointed negotiator will review the draft agreement and either make a final suggestion or advise the licensee that a recommendation will be made to the division director.~~
- ~~2. Two originals of the final proposal, signed by the licensee and dated, shall be mailed to the negotiator.~~
- ~~3. The negotiator will review the submissions to assure conformity with his expectations and return them to the division director with any recommendations.~~

~~4. The division director will review the proposal and write to the licensee, copying the negotiator, either affirming conditional approval to proceed to verification stage or stating changes required before the proposal will be conditionally approved.~~

~~5. Licensing staff will perform on site verification, advise the division director of results, and submit a written recommendation with rationale.~~

~~6. If the results warrant it, the division director will prepare a cover letter enclosing one of the original signed consent agreements, and will forward a copy to the licensing unit and all other parties who were copied on the adverse action letter.~~

~~7. If the on-site inspection is unsatisfactory, the division director will advise the licensee by letter.~~

~~D.~~ C. Throughout the duration of the consent agreement, licensing staff will make frequent inspections to determine whether the terms of the consent agreement are being implemented and whether its intended results are being achieved.